Supreme Court, U.S.
FILED
MAR 18 1992
OFFICE OF THE CLERK

(2)

No. 91-1326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE DISTRICT OF COLUMBIA
AND
SHARON PRATT KELLY, MAYOR,
Petitioners,

v.

THE GREATER WASHINGTON BOARD OF TRADE,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

---

BRIEF IN OPPOSITION OF RESPONDENT THE GREATER WASHINGTON BOARD OF TRADE

LAWRENCE P. POSTOL, ESQ.
SEYFARTH, SHAW,
FAIRWEATHER & GERALDSON
815 Connecticut Avenue, N.W., Suite 500
Washington, D.C. 20006-4004
(202) 463-2400

Counsel for Respondent
The Greater Washington Board of Trade

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED FOR REVIEW

Does the Employee Retirement Income Security Act of 1974 ("ERISA") preempt all state laws which relate to a *covered* ERISA plan? In particular, if a workers' compensation law requires an employer to provide an *exempt* ERISA plan, but the law ties the *exempt* ERISA plan's benefit level to the benefit level of a *covered* ERISA plan, is the workers' compensation law preempted? Thus, did the Court of Appeals in the decision below correctly hold that while a workers' compensation law can generally require specified medical benefits for injured workers, where the specified medical benefits are tied to the employer's health insurance benefits level (health insurance being a *covered* ERISA plan), the law is preempted by ERISA?

LIST OF PARTIES

Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, Respondent states that it is a non-profit corporation which pursues the interest of the business community in the greater Washington, D.C. area.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1326

THE DISTRICT OF COLUMBIA
AND
SHARON PRATT KELLY, MAYOR,
Petitioners,

v.

THE GREATER WASHINGTON BOARD OF TRADE,
Respondent.

BRIEF IN OPPOSITION OF RESPONDENT THE GREATER WASHINGTON BOARD OF TRADE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Respondent, The Greater Washington Board of Trade, by its counsel, respectfully submits this brief in opposition to the petition for writ of certiorari to the United States Court of Appeals For The District of Columbia Circuit (hereinafter referred to as "District of Columbia's Petition").

STATEMENT OF THE CASE

The Respondent disagrees with the Petitioners' statement of the case concerning the following points. To begin with, the Petitioners confuse ERISA ter-

minology, and thus a clarification is needed. ERISA deals with "employee benefit plans." 29 U.S.C. §1001(b). Virtually any benefits an employer provides its employees is an "employee benefit plan." *Id.* Thus, the definition includes not only pensions and health insurance, but the definition is so broad it encompasses benefits provided to comply with workers' compensation laws, disability laws, and unemployment compensation laws. If the employer gives a benefit to its employees for virtually any reasons, the system of benefits is an ERISA "employee benefit plan."

ERISA imposes various reporting and fiduciary requirements on plans. 29 U.S.C. §§1021-1031 (reporting and disclosure), 1051-1061 (vesting), 1081-1086 (funding), and 1101-1114 (fiduciary responsibility). The States, however, already regulate reporting and fiduciary requirements for their workers' compensation plans. Thus, in the definition of what ERISA covers, Congress exempted from ERISA's reporting and fiduciary requirements, employee benefit plans which are designed to comply with such workers' compensation laws. 29 U.S.C. §1003(b)(3); *See* S.Rep. No. 93-127, 93th Cong., 1st Sess. 47-48; H.R. Rep. No. 93-1280, 93th Cong., 2nd Sess. 255-56. Hence, while workers' compensation benefit plans are an ERISA "employee benefit plan," they are an *exempt* ERISA plan (the same is true of plans designed to comply with disability laws and unemployment compensation laws). In contrast, as Petitioners concede, health insurance is not exempt from ERISA coverage, and thus it is a *covered* ERISA plan. Petition at 15.

This Court has adopted this terminology of *exempt* and *covered* plans. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97n.16, (1983) ("Of course, §514(a) pre-

empts state laws only insofar as they relate to *plans covered* by *ERISA*."); *Mackey v. Lanier Collection Agency Service, Inc.*, 486 U.S. 825, 829 (1988) (ERISA §514(a) pre-empts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan *covered* by the statute."); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523n.20 (1981) (referring to "exempted plans"). Thus, the issue is not whether benefits are part of an ERISA "employee benefit plan," the question is whether the ERISA benefit plan is an *exempt* ERISA plan or a *covered* ERISA plan. Of critical import, ERISA preempts state laws which relate to *covered* plans, but ERISA does not preempt state laws which only relate to *exempt* plans. 29 U.S.C. §1144(a).

Three misstatements in the Petition's Statement of the Case also need to be corrected. First, Petitioners state that "ERISA reserves to the state the power to enact legislation governing subjects traditionally within their purview, such as legislation providing benefits to employees pursuant to workers' compensation, unemployment compensation and disability insurance laws, as well as legislation governing insurance, banking, security." Petition at 3. In point of fact, ERISA only saves insurance laws, banking laws, and security laws. 29 U.S.C. §1144(b). Workers' compensation laws (as well as unemployment compensation laws and disability laws) are *not* included in the ERISA saving clause. *Id.*[1]

---

[1] Of course, as noted above, *plans* which are designed to comply with workers' compensation laws (as well as unemployment compensation laws and disability laws) are exempt from ERISA's reporting and fiduciary requirements, and thus are referred to as *exempt* plans. 29 U.S.C. §1003(b)(3). This provision protects

Second, The Petitioners' characterization of the Court of Appeals decision herein as containing an "express contradiction" is also inaccurate. Petition at 8. This Court in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) in fact held (correctly) that if a law only relates to an *exempt* plan, the law is not preempted; whereas, if the law relates to a *covered* plan, the law is preempted. This Court in *Shaw* had one of each type of law before it, thus one law was held preempted, and one was not. *Id.* at 91 and 106.

Finally, contrary to the Petitions' assertion, Petition at 8, the Court of Appeals in its decision below did identify the administrative burden the District of Columbia workers' compensation law will impose on the covered ERISA plan—the employers' health insurance:

> While it is certainly true that *the [District of Columbia] Equity Amendment Act* does not require employers to alter ERISA-covered plans, it *explicitly ties the benefit levels of the workers' compensation plan to those of the ERISA-covered plan. . . .*The fact that the benefits to be provided to an employee receiving workers' compensation will be equivalent to the benefit levels provided while the employee is fully employed means that *every time an employer considers changing the benefits under its ERISA-covered plan, it would have to consider the effect that such a change would have on its unique obligations to its District employees receiving workers' compensation.* In light of the additional financial burden associated with an increase in ERISA health benefits, an employer might choose to forego such an increase altogether. This could have a substantial effect on the administration of an ERISA-covered plan.

the *plan*, but not the *law*. *See Alessi v. Raybestos Manhattan, Inc.*, 451 U.S. 504, 523n.20 (1981) (emphasis added) (citations omitted) ("They reason that "if a plan which is designed to 'comply with [an] applicable workmen's compensation law' is not preempted by ERISA, then a fortiori the underlying statute with which such plan is permitted to comply equally escapes coverage." *This reasoning wreaks havoc on ERISA's plain language, which pre-empts not plans, but "State laws."* 29 U.S.C. §1144(a). The only relevant state laws, or portions thereof, that survive this preemption provision are those relating to plans that are themselves exempted from ERISA's scope.").

Appendix at 17a - 18a (footnote omitted) (emphasis added). The Court of Appeals also noted, however, that an administrative burden is not required for preemption to apply. Appendix at 18a.

SUMMARY OF THE ARGUMENT

The decision at issue herein by the United States Court of Appeals for the District of Columbia Circuit is admittedly in conflict with a prior decision of the United States Court of Appeals for the Second Circuit. *R.R. Donnelly & Sons Co. v. Prevost*, 915 F.2d 787 (2d Cir. 1990), *cert. denied*, 111 S.Ct 1415 (1991). Both Connecticut and the District of Columbia enacted workers' compensation laws which for purposes of this appeal are identical—the laws require employers to provide a benefit equal to the workers' health insurance (which covers personal illnesses unrelated to any work injury) free of charge for 52 weeks to the extent the employer supplied the worker with health insurance before his injury. Respondent would respectfully submit, however, that this appeal is not

worthy of this Court's review because the decision below of the United States Court of Appeals for the District of Columbia is so clearly correct, that the Untied States Court of Appeals for the Second Circuit should be able to see that its earlier decision was incorrect, and thus overrule it in subsequent litigation.[2] Alternatively, Respondent would respectfully request that this Court grant the Petition, and then summarily affirm the decision below of the United States Court of Appeals for the District of Columbia Circuit.

The Second Circuit held that the Connecticut workers' compensation law is not preempted by ERISA because it relates to an *exempt* ERISA plan—the workers' compensation benefits it requires. If in fact the state mandated health benefits for injured workers were not tied to the employer's health insurance (which insurance is a *covered* ERISA plan), then the Second Circuit's decision would have been correct. The Second Circuit, however, overlooked and indeed never discussed the fact that the workers' compensation law, by triggering and indeed measuring the required health benefit level by the employer's health insurance (a *covered* ERISA plan), impermissibly related to a *covered* ERISA plan thus requiring preemption. The Court of Appeals decision below simply noted that the Second Circuit neglected this critical fact.

---

[2] While only two states have enacted such workers' compensation provisions, Respondent can not state that this issue lacks national importance. The Connecticut statute maybe a model for other states, as in fact happened in the District of Columbia, and run away workers' compensation costs are a national concern.

Similarly, the Petitioner's argument that the Court of Appeals decision herein is contrary to this Court's decision in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, (1983) is simply wrong. The *Shaw* decision dealt, in pertinent part, with a law which only related to an *exempt* ERISA plan, and did *not* relate to a *covered* ERISA plan. Petitioners conceded, as they must, that the District of Columbia workers' compensation law at issue herein is in fact related to a *covered* ERISA plan - the employer's health insurance. As such, the law could only be saved by ERISA's saving clause, 29 U.S.C. §1144(b), which it is uncontroverted does not apply.

ARGUMENT

I. THE DISTRICT OF COLUMBIA CIRCUIT COURT'S DECISION IS SO CLEARLY CORRECT, THAT THE GRANTING OF THE PETITION IS UNNECESSARY. ALTERNATIVELY, THE PETITION SHOULD BE GRANTED, BUT THE DECISION BELOW SHOULD BE SUMMARILY AFFIRMED. BY TYING THE WORKERS' COMPENSATION BENEFITS TO A COVERED ERISA PLAN–THE EMPLOYER'S HEALTH INSURANCE, THE D.C. LAW IMPERMISSIBLY CROSSED THE ERISA PRE-EMPTION LINE: IT RELATES TO A COVERED ERISA PLAN

Section 514(a) of ERISA is clear: if a law relates to a *covered* plan it is preempted; whereas, if it relates to an *exempt* plan it is not preempted. 29 U.S.C. §1144(a). Section 4(b)(3) of ERISA then states, inter alia, that a plan which provides benefits to comply with a workers' compensation law is an exempt plan. 29 U.S.C. §1003(b)(3).

Thus, the District of Columbia workers' compensation law, by requiring health benefits, was estab-

lishing an *exempt* ERISA plan and thus the mere requirement of health benefits does not require preemption. However, by tying the benefit level to the employer's health insurance (which is a *covered* ERISA plan), the law clearly relates to a covered ERISA plan and is thus preempted.

The Court of Appeals in its decision below, merely noted these now obvious points, and observed that the Second Circuit in *R.R. Donnelly & Sons, Co. v. Prevost*, 915 F.2d 787 (2d Cir. 1990), *cert. denied*, 111 S.Ct 1415 (1991) overlooked this second point. Similarly, the Court of Appeals in its decision below noted that this Court's decision in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) was inapplicable, because the benefit levels required in that case by the *exempt* plan (one set up to comply with a disability law) were not tied or connected in any way to a *covered* ERISA plan:

> The [District of Columbia] Equity Amendment Act relates, in fact, to two different plans: First, the Act "relates to" an ERISA-covered plan by requiring that the new benefits be "equivalent" to those already provided under an existing covered plan and by defining the employers who are obliged to provide the new benefits as those who are obliged to provide the new benefits as those who already provide benefits under a covered plan. Second, by requiring new benefits to be provided to employees who have been injured on the job, the Act "relates to" a workers' compensation plan that is, by virtue of the exemption for such plans under section 4(b)(3), exempt from ERISA coverage. So,

> the Act relates both to an ERISA-covered plan and to a plan that is exempt from ERISA coverage.
>
> The district court relied on *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), for the argument that because the Act related to a plan that was exempt from ERISA coverage, it was saved from preemption.
>
> * * *
>
> But in our case, as we have already observed, the Equity Amendment Act relates to two plans—one that is ERISA covered and one that is exempt from ERISA coverage. Had the Equity Amendment Act related only to the workers' compensation plan—had it, for example, made no reference to existing ERISA-covered plans and simply required all employers to provide specified minimum health benefits for employees receiving workers' compensation—it would clearly have survived preemption under the principles announced in Shaw.
>
> The key issue in distinguishing Shaw from this case is that the Court in Shaw never found that New York Disability Benefits Law related to an ERISA-covered plan. The Court did find that the Disability Benefits Law plainly related to an "employee benefit plan," Shaw, 463 U.S. at 106, but a law is preempted under section 514(a) only if it relates to an employee benefit plan that is not exempt. The plan to which the New York Disability Benefits Law related was exempt,

so the law did not even qualify at the threshold for preemption.

Shaw would have governed this case had the Equity Amendment Act related only to the exempt plan; in that case, the Act would not have been preempted. But Shaw does not tell us why an Act that relates to an ERISA-covered plan can avoid preemption simply because it also relates to a plan exempt from ERISA coverage. Not only is there no authority in Shaw for this proposition, but it is entirely at odds with ERISA's statutory structure.

* * *

But the Second Circuit focused on only half the story. By concentrating on how and in what ways the new workers' compensation plans would be exempt from ERISA coverage, the court failed to appreciate the fact that the Connecticut statute (like the Equity Amendment Act in this case) related to an ERISA-covered plan by tying the new benefits to existing benefits and by limiting the law's applicability to employers already providing benefits through ERISA plans.

Appendix at 11a-15a (footnotes omitted).

The analysis of the District of Columbia Circuit in the decision below is so clearly correct, that the involvement of this Court is not warranted. This Court should simply deny the Petition, leaving the Second Circuit to follow the persuasive power of the District of Columbia Circuit's decision. Alternatively, this Court should grant the Petition, and then summarily

affirm the District of Columbia Circuit's decision based on its clearly correct analysis.

Petitioners, apparently realizing the force of the Court of Appeals' analysis, argue in their Petition for a new position adopted by no court—not *Donnelly* or *Shaw*. Petitioners argue that since all workers' compensation laws relate to a *covered* ERISA plan, such laws must be permitted if the plan they require is separate from the *covered* ERISA plan. Not only does such an argument do violence to the statutory language, Petitioner's premise is simply not true. Not all workers' compensation laws relate to a *covered* ERISA plan. To the contrary, virtually all workers' compensation laws do not relate to a covered ERISA plan; rather, such a relationship only occurs in the rare circumstance, such as in the Connecticut and District of Columbia laws discussed herein; where the workers' compensation system ties its benefit levels to the employer's health insurance plan. If that tie is not attempted, there is no relation to a *covered* ERISA plan and hence there is no preemption. That is the whole point of the *Shaw* decision. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 106 (1983). Indeed, the *Shaw* decision's only limitation is that, to make sure there is no tie to a *covered* ERISA plan, the law can not even require that the *exempt* ERISA plan be part of a *covered* ERISA plan. The law can only permit employers the option to include the two plans together. *Id.* at 208. Petitioners' new argument should thus summarily be rejected.

CONCLUSION

The Petition For Writ Of Certiorari should be denied. Alternatively, the Petition should be granted, and the decision of the Court of Appeals should be summarily affirmed.

Respectfully submitted,

LAWRENCE P. POSTOL
SEYFARTH, SHAW,
FAIRWEATHER & GERALDSON
815 Connecticut Avenue, N.W., Suite 500
Washington, D.C. 20006-4004
(202) 463-2400

Counsel for Respondent
The Greater Washington Board of Trade

DATED: March 18, 1992